SUPREME COURT OF THE UNITED STATES.

No. 216.—October Term, 1925.

The United States of America, Plaintiff in Error, *vs.* The P. Koenig Coal Company.	In Error to the District Court of the United States for the Eastern District of Michigan.

[April 12, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The P. Koenig Coal Company was indicted in the District Court for the Eastern District of Michigan, under the Elkins Act, for knowingly receiving as a shipper concessions from a carrier under the Interstate Commerce Act in respect to transportation of property in interstate commerce obtained by deceitful representation made to the carriers on which the carriers innocently and in good faith relied. The District Court sustained a demurrer to the indictment, and the United States prosecutes a writ of error under the Criminal Appeals Act (Judicial Code, sec. 238, par. 2, as reenacted by the Act of February 13, 1925, 43 Stat. 938, c. 229), which provides that a writ of error from the District Court may be taken directly to this Court from a judgment sustaining a demurrer to any indictment or any count thereof where such judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

The District Court held that section 1 of the Elkins Act of February 9, 1903, c. 708, 32 Stat. 847 (re-enacted in section 2 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 587), under which the indictment was found, applies only to a shipper who knowingly receives a concession from a carrier when such concession is knowingly granted by the carrier in equal guilt with the shipper. *United States* v. *The P. Koenig Coal Company,* 1 Fed. (2d) 738.

The Koenig Coal Company is a Michigan corporation doing business in Detroit. The defendant was indicted on eighteen counts applying respectively to eighteen carloads of coal. The shipments originated in West Virginia, and were moved to Detroit in August,

1922, over the Chesapeake & Ohio Railroad Company as the initial carrier for each car.

On July 25, 1922, the Interstate Commerce Commission, acting under the Transportation Act of February 28, 1920 (c. 91, Title 4, sec. 402, (15), 41 Stat. 456, 476), issued its service order No. 23. Section 15 gives the Commission, when shortage of equipment, congestion of traffic or other emergency requires action in any section of the country, authority to suspend its rules as to car service, and to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people, and to give direction for performance or priority in transportation or movement of traffic. Service Order No. 23 declared that there was an emergency upon the railroad lines east of the Mississippi River, and directed that coal cars should be furnished to the mines according to a certain order of purposes, numbered in classes 1, 2, 3, 4 and 5, and that no coal embraced in classes 1, 2, 3 and 4 should be subject to reconsignment, or diversion except for some purpose in the same or a superior class. The order required that the carriers should give preference and priority in the placement and assignment of cars for the loading of coal to those required for the current use of hospitals which were placed in class 2, in priority to cars for the loading of coal required for the manufacture of automobiles or automobile parts, which were placed in class 5 and later in class 3. The order remained in force from July 25 to September 20, 1922. The first count of the indictment charged that the defendant intending to obtain a preference and priority in transportation, which it was not then lawfully entitled to receive, and to procure the coal for the use of Dodge & Company engaged in the manufacture of automobiles and parts thereof, sent a telegraphic order to the Monitor Coal & Coke Company of Huntington, West Virginia, asking the shipment of carloads of coal to the Koenig Coal Company at Detroit for the use of the Samaritan Hospital, that it thereby secured the furnishing by the C. & O. Company on August 5, 1922, at the request of the Monitor Company, of one car suitable for the loading and transportation of coal on its line in West Virginia, which was billed and consigned in accordance with the telegraphic order; that when it reached Detroit, the defendant diverted the car to Dodge Brothers who used the coal, the Samaritan Hospital not needing or requiring the coal, and not having authorized or requested the defendant to send the order; that the

concession and discrimination was thus obtained by a deceitful device of which the carriers had no knowledge. The other seventeen counts are similar and refer to different cars of coal, some of them to different mines and consignors and some to different beneficiaries of the trick as actual consumers of the coal.

The demurrer challenged the indictment on various grounds, 1st, that the facts charged did not constitute a concession given or a discrimination practiced as defined by the Elkins Act; 2nd, that the restrictions imposed by the Interstate Commerce Commission's Service Order No. 23 were beyond the power of the Interstate Commerce Commission in that they were an exercise of purely legislative power which could not be delegated; 3rd, that the service order exceeded the authority conferred upon the Interstate Commerce Commission; 4th, in that it was beyond the power of the Federal Government thus to affect the use, consumption, price and disposition of coal in what was the exercise of a local police power reserved to the States; 5th, that the order is so arbitrary and unreasonable as not to be within the power of the National Government and to be an encroachment on the powers of the several States; 6th, that the service order violated the Fifth Amendment in depriving defendant of liberty and property without due process of law, and, 7th, that it was invalid because it gave preference to the Lake Erie ports of Ohio and Pennsylvania over the ports of other States in respect to the transportation and shipment of coal.

All of these objections, except the first and third, are covered by the decision of this Court in *Avent* v. *United States,* 266 U. S. 127, where we held that Congress might consistently with the Fifth Amendment require a preference in the order of purposes for which coal might be carried in interstate commerce, that it did not trench upon the power reserved to the States, that the power might be delegated to the Interstate Commerce Commission for exercise under rules that were reasonable and in the interests of the public and of commerce, that the violation of such rules might be made a crime, and that the objection that the order unconstitutionally preferred the ports of one State over those of another could not avail a party whom the alleged preference did not concern.

Counsel for the defendant in his brief and argument supports the demurrer solely upon the same ground upon which the District Court sustained it, namely that the offense under which the indictment is drawn can not be committed without the guilty knowl-

edge and collusion of both the shipper and the carrier. The relevant part of section one of the Elkins Act reads as follows:

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000, nor more than $20,000."

This makes it unlawful for anyone to receive any concession in respect of transportation of any property in interstate commerce by a common carrier whereby any advantage is given or any discrimination is practiced. The facts charged bring what was done exactly within this description. It was a priority or preference in securing the transportation of coal in an emergent congestion of the traffic. It was certainly a concession and one of value to one who under the law or the regulations having the force of law could not secure that priority. The words advantage, concession and discrimination in the statute must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful advantage or a lawful discrimination. It is asked, if this was a concession, by whom was it conceded? The answer is by the carrier. He granted the priority and therefore he made the concession and gave the advantage and practiced the discrimination. But it was unlawful and he did not know the facts which made it so. The shipper knew them because he had secured it by his deceit and received it. What is there in the statute that releases him from guilt, because the carrier who yielded to him the concession and gave him the advantage and made the discrimination thought it was lawful?

Reference is made to the debates in Congress and to decisions of this Court to show that in the minds of the legislators in enacting the Elkins Act, the discrimination and inequality they sought to

prevent had in the past arisen chiefly from collusion between the carrier and the shipper. As practical men of course they knew that this was the way in which violations of the law were most likely to occur. But this does not at all justify the conclusion that Congress in enacting the Elkins law intended to limit the offenses described in it to cases of collusion, if otherwise the acts charged came within the words of the statute.

We have often declared that the purpose of Congress in the Elkins law was to cut up by the roots every form of discrimination, favoritism and inequality. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72; *United States* v. *The Union Stock Yards*, 226 U. S. 286, 309. It would be contrary, therefore, to the general intent of the law to restrain the effect of the language used so as not to include acts exactly described when they clearly effect discrimination and inequality. Certainly no one would say that a shipper might not be convicted under the act of soliciting an unlawful concession or advantage or discrimination even though the carrier refused to extend it to him. So, too, if a carrier offers an unlawful advantage to a shipper who declines it, clearly the carrier may be indicted and punished. Collusion is not necessary in such a case. Why in this? The act is plainly not confined to joint crimes. The general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislature is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged.

In *Dye* v. *United States*, 262 Fed. 6, a defendant in an indictment under the Elkins Act was the agent of a carrier and was in charge of the distribution of cars between coal mines during an emergency and car shortage. By a device, he violated the rule of distribution established by the Commission and secured an excessive number of cars for a particular mine, the operators of which were innocent of the inequality. He did this for his personal profit by sale of the excess. His conviction was sustained by the Circuit Court of Appeals for the Fourth Circuit.

In *Missouri, Kansas & Texas Pacific Ry. Co.* v. *Harriman*, 227 U. S. 657, the Court had to deal with the question whether a shipper who valued his goods for the purpose of obtaining the lower of two published rates based on valuation was in an action for their loss estopped from recovering a greater amount than his

own valuation, the carrier having no knowledge of the value of the shipment. It was held that he was estopped. In reaching this conclusion, Mr. Justice Lurton, speaking for the Court, at page 671, said:

"If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708)."

It is true that this was said *arguendo*, but it has persuasive weight and now that the point is before us for judgment we reaffirm it. Compare also *Illinois Central Railroad Co.* v. *Messina*, 240 U. S. 395, 397.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 217.—October Term, 1925.

The United States, Plaintiff in Error, *vs.* Michigan Portland Cement Company.	In error to the District Court of the United States for the Eastern District of Michigan.

[April 12, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case on its facts is similar to that of the *United States* v. *The P. Koenig Coal Company,* just decided. The indictment against the Cement Company embraces fifteen counts, and each court shows that the Cement Company, with the assistance of the Bewley Darst Coal Company, while Service Order No. 23 of the Interstate Commerce Commission was in force, obtained a billing and consignment of cars of coal by the Louisville & Nashville Railroad Company from a mine in Kentucky to the Municipal Light and Power Company at Four Mile Lake in Michigan where the coal was delivered in accordance with direction and was appropriated by the Cement Company for its use; that the billing and the preference were granted by the carrier company on the assumption that the coal was to be delivered and used by a public utility company which was in class No. 2 under Order No. 23, instead of class No. 5 in which coal for making cement was embraced. The District Court sustained the demurrer to this indictment on the same ground as in the *Koenig* case, that the Elkins Act requires the collusion of the carrier with the shipper and the carrier's conscious violation of law in the concession granted, and that when this is negatived in the indictment, the indictment must fail. That ground we have held to be without weight in the *Koenig* case. It was the only one pressed on us.

In this case the counsel for the defendant advances in his brief and argument two other grounds raised by the demurrer on which he contends the indictment should have been held bad. One of them is that section 1 of the Elkins Act, under which the indictment is found, must be limited to a concession or discrimination

which violates a tariff published and filed by a carrier, that as a rebate without such tariff is not unlawful within that section, so a concession or discrimination is not. The contention is that the published tariff should have indicated that the order of distribution of cars should be as Order 23 requires.

The Elkins Act does not require such a tariff as to any other advantage or discrimination than a rebate. It declares to be an offense any device whereby transportation shall be given at any less rate than named in the published tariff "or whereby any other advantage is given or discrimination is practiced." Where the offense consists in a rebate, as that term is usually understood, to-wit, transportation at a less rate in dollars and cents than the published rate which the shipping public are charged, a published tariff is of course necessary to constitute the standard, departure from which is the crime. Where there is no pecuniary reduction of the rates as published, and the tariff is complied with but the law against favoritism and discrimination is infringed by the making of a concession or the granting of an advantage not specifically measured in dollars and cents, reference to a published tariff is unnecessary. There is nothing in the statute that indicates the necessity of a published tariff which should expressly recite the fact that no unfair or unequal concession or advantage in the distribution of coal cars to shippers, or in the priority of their shipment, should be afforded. The fact that the advantage or discrimination is unlawful is plain from the description of its character, as shown in this indictment without reference to the rates fixed in the tariff. See *Lambert Run Coal Co.* v. *B. & O. R. R.*, 258 U. S. 377, 378. Such a published tariff seems not to have been present in *C. C. C. & St. L. Ry. Co.* v. *Hirsch*, 204 Fed. 849, and in *Central of Georgia Ry.* v. *Blount*, 238 Fed. 292, in which leases of property by carriers to shippers at inadequate rentals were held to be unlawful concessions. Nor in *Vandalia Railway* v. *United States*, 226 Fed. 713, where a loan by a carrier to shipping interests at less than market rate, was held to be an unlawful concession. Nor in *Northern Central Railway* v. *United States*, 241 Fed. 25, where the waiving of royalties for the use of coal lands leased to shipping interests was held to be an unlawful concession. Nor in *Dye* v. *United States*, 262 Fed. 6, in which the agent of a railway company who secured an excessive number of cars for one of a great number of mines between which, by order of the Interstate Commerce Commission, in an emergency, cars were to be distributed accord-

ing to a rule, was convicted under the Elkins Act, and the Fourth Circuit Court of Appeals sustained the conviction.

Service Order No. 23 herein was issued under the Transportation Act and had the force of law. *Avent* v. *United States*, 266 U. S. 127, 131; *United States* v. *Grimaud*, 220 U. S. 506. In the absence of a specific requirement for its publication in a tariff either in the act authorizing the service order, or in the Elkins Act, we can find no reason for making it essential in the enforcement of the statute and no case is cited to suggest one.

The other ground urged by counsel for the defendant is, if we understand it, that paragraph 15 of section 402 of the Transportation Act did not authorize and delegate to the Interstate Commerce Commission the fixing of preference and priorities in transportation, that paragraph 7 of the Commission's order prescribed classes of purposes and order of classes only with respect to car service, and made no rule applicable to the transportation of coal for different classes of purposes and different order of classes, that car service does not include transportation, and that the defendant here is indicted for securing a concession in transportation by which he obtained an improper class under a classification which the Commission therefore had no authority to make and which it did not in fact require. We think the argument does not give proper effect to paragraph 15 and the words and significance of the service order. By paragraph 15 the Commission is authorized, 1st, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission; 2nd, to make such just and reasonable directions with respect to car service without regard to the ownership as between the carriers of cars, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, and, 3rd, to give directions for preference or priority in transportation, embargoes, or movement of traffic under permit and for such periods as it may determine, and to modify, change, suspend or annul them. The service order, after reciting the emergency, directs each common carrier east of the Mississippi River to the extent to which it is unable promptly to transport all freight traffic, to give preference and priority to coal, to give preference and priority to the movement, exchange and return of empty coal cars, to furnish coal mines with certain classes of cars, to require that non-coal loading carriers deliver empty coal cars to the maximum ability of each, to enable the connecting coal loading companies

to receive and use the coal cars so delivered for the preferential purposes set forth in the order; to discontinue the use of coal cars for the transportation of commodities other than coal during the order, to place an embargo on the receipt by any consignee of coal in suitable cars who shall fail or refuse to unload the coal seasonably; and finally in the supply of cars to mines to place, furnish and assign coal mines with cars suitable for the loading and transportation of coal for certain classes of consignees, and in a certain order, forbidding reconsignment or diversion. It seems to us clear that the order of the Commission affects the furnishing of cars, their loading, their consignment and thus necessarily their movement in transportation and corresponds fully with the powers conferred by section 15; and that section 15 and Service Order No. 23 both apply not only to priority of car service but also to that of transportation. Certainly one who secures reconsignment and diversion from a lower to a higher class of consignees for delivery violates the service order in terms.

In urging this objection to the indictment, reliance is had by defendant upon the opinion of this Court in the case of *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528. There the Interstate Commerce Commission sought under section 1 to compel a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for another connecting carrier. It was held that the exercise of the emergency power of the Commission in transferring car equipment from one carrier to the use of another under paragraph 15 was strictly to be construed, and that the provision as to car service did not authorize the Commission to impose upon the terminal carrier, without a hearing, the affirmative duty not only of turning over its cars and equipment to another carrier, as contemplated in paragraph 15, but also that of itself doing the work of the transportation of and for another carrier. It was in this connection that this Court used the expression that car service connotes the use to which vehicles of transportation are put, but not the transportation service rendered by means of them. The opinion expressly affirms the authority of the Commission under paragraph 15 to give regulatory directions for preference or priority in transportation. The language of this Court in the *Peoria* case referred to is of no aid to the defendant here.

The judgment is

Reversed.